

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

**REPLY COMMENTS OF THE VERMONT PSB, VERMONT DPS, MAINE PUC,  
CONNECTME AUTHORITY AND WYOMING PUC AND RESPONSE TO QWEST  
PROPOSAL TO REVISE THE NON-RURAL MECHANISM**

**I. Introduction**

The Vermont Public Service Board (“Vermont”), the Vermont Department of Public Service (“VtDPS”), the Maine Public Utilities Commission (“Maine”), the ConnectME Authority (“ConnectME”), and the Wyoming Public Service Commission (“Wyoming”) (collectively, “Commenting States”), submit this reply to initial comments on the Notices of Proposed Rulemaking, released January 29, 2008, proposing reform of the universal service program.<sup>1</sup> The Commenting States strongly support initial comments urging that the Commission respond to the 10<sup>th</sup> Circuit’s decision in *Qwest Communications v. FCC*<sup>2</sup> before it

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<sup>1</sup> *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 08-22 (rel. January 29, 2008) (“*RD NPRM*”); *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 08-5 (rel. January 29, 2008) (“*Auctions NPRM*”); *In the Matter of High Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 08-4 (rel. January 29, 2008) (“*ISR NPRM*”).

<sup>2</sup> *Qwest Communications Int’l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (“*Qwest II*”).

adopts specific long term reform.<sup>3</sup> Also, the Commenting States recommend that the Commission reject the proposal filed on May 5, 2008, by Qwest Communications International Inc. (“Qwest”), for implementing the 10<sup>th</sup> Circuit case to the extent it proposes, once again, that statewide cost averaging be eliminated.<sup>4</sup> The Qwest proposal does not meet the *Qwest II* standard. The Commenting States support revising the non-rural mechanism as soon as the Commission adopts definitions for the Section 254 terms that are consistent with the Act’s principles.

## **II. The Commission Should Adopt Definitions for Section 254 Terms before it Evaluates Long Term Reform Proposals**

The Commenting States agree with initial comments recommending the Commission adopt definitions for Section 254’s key terms “reasonably comparable” and “sufficiently” that are consistent with the statute, as the 10<sup>th</sup> Circuit Court has directed. It should evaluate reform proposals based on these more properly defined goals.

In *Qwest Corp. v. FCC* (“*Qwest I*”),<sup>5</sup> the 10<sup>th</sup> Circuit Court of Appeals reversed and remanded the Commission’s mechanism for providing universal service support to non-rural

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<sup>3</sup> Maine, VtDPS, ConnectME, and Wyoming, in Joint Initial Comments, showed that the Commission must make a legal finding as to what constitutes “reasonably comparable” rates and services, and what constitutes “sufficient” support before it proceeds to make the functional and legal findings necessary to implement the Joint Board Recommendation. *In the Matter of Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Comments of Maine Public Utilities Commission, ConnectME Authority, Wyoming Public Service Commission, and Vermont Department of Public Service (April 17, 2008)

<sup>4</sup> *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Qwest Communications International, Inc., *ex parte* (filed May 5, 2008) (“*Qwest ex parte*”).

<sup>5</sup> *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) (“*Qwest I*”).

carriers.<sup>6</sup> The Court directed the Commission to more precisely define the terms “sufficiently” and “reasonably comparable” in sections 254(e) and 254(b) of the Act, respectively, “in a way that can be reasonably related to the statutory principles.”<sup>7</sup>

In 2003, the Commission responded to *Qwest I* with an Order on Remand.<sup>8</sup> The Commission defined “sufficient” as “enough federal support to enable states to achieve reasonable comparability of rural and urban rates in high-cost areas served by non-rural carriers.”<sup>9</sup> It also defined “reasonably comparable” rural rates as rates within two standard deviations, or roughly 138%, of the national urban average.<sup>10</sup>

In a second appeal, *Qwest II*, the 10<sup>th</sup> Circuit held that the Commission had “failed to reasonably define” both statutory terms and once again remanded the matter to the Commission.<sup>11</sup> The Court rejected the new definition of “sufficient” because it focused exclusively on reasonable comparability without acknowledging any of the six other statutory principles.<sup>12</sup> The Court rejected the reasonable comparability standard because it was based on an impermissible construction of the underlying statute.<sup>13</sup> Due to the importance of these basic

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<sup>6</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report & Order and Eighteenth Order on Reconsideration, FCC 99-306, (rel. Nov. 2, 1999) (“*Ninth Report & Order*”).

<sup>7</sup> *Qwest I*, 258 F.3d at 1202.

<sup>8</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order on Remand, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 03-249, (rel. Oct. 27, 2003) (“*Order on Remand*”).

<sup>9</sup> *Order on Remand* ¶ 4.

<sup>10</sup> *Order on Remand* ¶ 41.

<sup>11</sup> *Qwest II*, 348 F.3d at 1233.

<sup>12</sup> *Id.* at 1234.

<sup>13</sup> *Id.* at 1235-7. The Court concluded that the comparability benchmark was based on the unsupported conclusion that Congress used the terms “preserve” and “preservation” in the Act because it was satisfied with the existing disparity between rural and urban rates in 1996.

definitions, the Court required the Commission “to comply with our decision in an expeditious manner.”<sup>14</sup> **Despite the Court’s mandate, the remand has been pending since 2005, and the Commission has yet to issue an Order establishing new definitions for these fundamental statutory terms.**

Parties representing diverse interests and groups have all urged that the Commission revise its standards and definitions pursuant to the *Qwest II* remand before evaluating long-term reform proposals.<sup>15</sup> NASUCA commented that the three recent NPRMs jump to specific solutions without first settling underlying issues and argued that the Commission has been “easily distracted by new or peripheral issues while older and more fundamental issues remain unresolved.”<sup>16</sup> As NASUCA said, these terms “are the underpinnings and the purpose of the universal service programs” and must not remain undefined.<sup>17</sup> SouthernLinc Wireless also argued that “[t]he Commission cannot adequately consider any reform proposal until it has adopted objective, measurable goals for universal service support.”<sup>18</sup> The New Jersey Division of Rate Counsel cited the pending remand and stated that “[t]his unresolved issue bears directly

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<sup>14</sup> *Id.* at 1239.

<sup>15</sup> *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45; Comments of AT&T at p. 29; Comments of CTIA at pp. 20-21; Comments of NASUCA at p. 9; Comments of the New Jersey Division of Rate Counsel at p. 46; Comments of the North Dakota Public Service Commission at p. 7; Comments of SouthernLinc Wireless at p. 5 (filed April 17, 2008).

<sup>16</sup> *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Comments of NASUCA at p. 9 (filed April 17, 2008).

<sup>17</sup> *Id.*

<sup>18</sup> *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Comments of SouthernLinc Wireless at p. 5 (filed April 17, 2008).

on the issues under investigation in the proceeding.”<sup>19</sup> Similarly, the North Dakota Public Service Commission cited to *Qwest II* as part of its argument against the since-enacted interim cap on high-cost support, arguing that the Commission “must address issues related to the *Qwest II* decision.”<sup>20</sup>

The Vermont, Wyoming, and Maine state commissions, and commissions and related agencies from Nebraska, South Dakota, Kentucky and West Virginia, have pressed the Commission to resolve the 10<sup>th</sup> Circuit remand issues for many months, and several carriers have requested waivers of universal service rules to provide company-specific fixes. The Commenting States attach a Chronology at Exhibit A, summarizing some of these efforts. For example, Hawaiian Telcom, which does not receive any support when its costs are averaged statewide, asked for a waiver of the universal service rules so that it could receive support for its high cost wire centers.<sup>21</sup> Vermont, Maine and other states strongly opposed Hawaiian Telcom’s request and have repeatedly asked the Commission to address the 10<sup>th</sup> Circuit case before granting any company-specific solutions. It is imperative that the Commission adopt proper definitions and standards now to guide long term reform.

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<sup>19</sup> *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Comments of the New Jersey Division of Rate Counsel at p. 46 (filed April 17, 2008).

<sup>20</sup> *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Comments of the North Dakota Public Service Commission at p. 7 (filed April 17, 2008).

<sup>21</sup> *In the Matter of Hawaiian Telcom, Inc. Petition For Waiver of Sections 54.309 and 54.313(d)(vi) of the Commission’s Rules*, WC Docket No. 08-4 (Dec. 31, 2007). The relief Hawaiian Telecom requested is similar to Qwest’s request in its May 5, 2008 *ex parte* proposal.

Wyoming has pursued a remedy for residential rate disparity since 2004 and is still awaiting Commission action.<sup>22</sup> This proceeding is still pending before the Commission. Rural residential customers served by the Wyoming non-rural incumbent local exchange carrier (Qwest) pay a monthly rate of \$44.07, or 127 percent of the \$34.83 nationwide urban rate benchmark. Wyoming has concluded that its rural residential rates are not reasonably comparable to the nationwide urban rate benchmark.

### **III. The Commission Should Revise the Non-Rural Mechanism after it Adopts Definitions, but Not Adopt Qwest's Proposal to Eliminate Statewide Averaging**

In its May 5, 2008 *ex parte* letter, Qwest makes two requests. Like many initial commenters, it asks the Commission to immediately adopt rules that address the 10<sup>th</sup> Circuit's mandate.<sup>23</sup> The Commenting States concur with these views.

Second, Qwest asks that the Commission replace its current non-rural support mechanism with federal support targeted to the highest cost wire centers (*i.e.*, those with a cost per line of more than 125% of the national average urban rate).<sup>24</sup> Qwest says this proposal will implement *Qwest II*.<sup>25</sup> The Commenting States strongly disagree with this approach to the extent it eliminates statewide averaging of costs. The only way to provide sufficient support under the *Qwest II* standard, and have a Fund that is not astronomical in size, is to base support on statewide average costs.

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<sup>22</sup> On December 21, 2004, Wyoming, along with the Wyoming Office of Consumer Advocate, filed a *Joint Petition for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier (Joint Petition)*, with the Commission.

<sup>23</sup> *Qwest ex parte* at p. 1.

<sup>24</sup> *Qwest ex parte* at p. 2.

<sup>25</sup> *Qwest ex parte* proposal attached to *ex parte*, p. 1

The FCC adopted the statewide average policy when it first designed its non-rural cost mechanism, and both the *Qwest I* and *Qwest II* courts affirmed this policy as fundamental to achieving universal service goals.<sup>26</sup> As the FCC described in its 2003 *Remand Order*, statewide cost averaging ensures a proper division of federal and state responsibility for USF support:

The general framework of the non-rural mechanism, through the use of statewide average costs, *reflects the appropriate division of Federal and state responsibility for determining high-cost support for non-rural carriers.* The non-rural mechanism estimates costs by determining the average cost in each wire center...and...averaging the wire center costs at the state level. States with high average costs do not have enough low-cost lines to support their high-cost areas. High-cost states receive Federal non-rural support, which is targeted to their high-cost wire centers. This is the most reasonable way to identify the states that do not have enough non-rural carrier low-cost lines to keep their rural rates reasonably comparable to urban rates in most other states. *Statewide averaging effectively enables the state to support its high-cost wire centers with funds from its low-cost wire centers through implicit or explicit support mechanisms, rather than unnecessarily shifting funds from other states.*<sup>27</sup>

The FCC's holding in its *Remand Order* followed the *Qwest I* decision affirming the shared federal/state responsibility for universal service goals.<sup>28</sup> The *Qwest I* Court rejected Qwest's similar effort to shift its cost of serving high-cost wire centers to the federal USF, concluding that the Commission and the federal USF could not practically shoulder this massive support burden alone.<sup>29</sup>

Qwest's current proposal to eliminate statewide averaging makes this same losing argument and that principle should be immediately and summarily rejected to avoid ballooning the Fund. However, the Commission should move forward to revise its non-rural mechanism, as soon as it can adopt statutory term definitions.

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<sup>26</sup> See *Qwest I*, 258 F.3d 1203; *Qwest II*, 398 F.3d 1237.

<sup>27</sup> *Order on Remand* ¶ 24 (emphasis added).

<sup>28</sup> *Qwest I*, 258 F.3d 1203.

<sup>29</sup> *Id.*

Dated this 2nd day of June, 2008.

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**EXHIBIT A**

**CHRONOLOGY**

## CHRONOLOGY

- 1996 Congress passes Telecommunications Act, adopting as universal service principle, that consumers in rural areas should have access to telecommunications services at rates that are reasonably comparable to rates charged for similar services in urban areas. Section 254(b)(3).
- Nov. 1999 FCC issues 9th Report and Order implementing non-rural carrier USF mechanism.
- 2001 *Qwest Corp. v. FCC*: 10th Circuit Court reverses and remands Order No. 9. (Court found FCC, among other things, had failed to define key statutory terms, failed to justify cost 135% benchmark, and failed to evaluate data in the record comparing rural and urban costs under the proposed funding mechanism. Court directed FCC to define relevant statutory terms; assess whether funding mechanism will be sufficient to make rates reasonably comparable; provide adequate record support and reasoning for support level determined; and develop mechanisms to induce state action to assist in implementing USF goals.)
- Oct. 2003 FCC issues Remand Order. Chairman Martin criticizes the order in a separate statement: "I believe that today's effort . . . falls short in meeting our obligation to ensure that consumers living in rural and high cost areas have access to similar telecommunications services at rates that are reasonably comparable to rates paid by urban consumers....Today's recommendation falls short in its response to the court mandate that we define the statutory term 'reasonably comparable' for purposes of the cost-based support mechanism and fails to demonstrate, with any degree of specificity, how the proposed secondary mechanism will satisfy the statutory requirement that universal service support be 'specific, predictable and sufficient.'"
- Feb. 2005 *Qwest Communications Intl. v. FCC*: 10th Circuit Court reverses Remand Order in part. (Court found FCC, among other things, had not properly defined statutory terms, its comparability benchmark still allowed significant variance between urban and rural rates to continue unabated; and support not shown to be sufficient to make rates reasonably comparable. Court states expectation that FCC will act in "an expeditious manner.")
- Dec. 2005 FCC seeks comment on remand issues
- March 2006 Comment cycle closes

Mid-March 2007	Vermont conducts meetings at the FCC to discuss timetable for resolving remand issues
March 15, 2007 (approx.)	Chairman Martin states in response to questions posed by Senator Snowe in a February 7, 2007 Senate Commerce Committee hearing that he intends to circulate an order resolving this issue before the end of the year.
March 19, 2007	The Maine, Wyoming, Vermont, Kentucky, Montana, Nebraska and South Dakota state commissions, and related state agencies, send letters to Chairman Martin asking that the FCC establish an early timetable for resolution of remand issues.
May 31, 2007	The Nebraska, Maine, South Dakota, Vermont and Kentucky state commissions and related agencies files an <i>ex parte</i> letter objecting to grant of Iowa Telcom Petition for Interim Waiver of the Commission's Universal Service High Cost Loop Support mechanisms (WC Docket No. 05-337), and Petition for Forbearance under 47 U.S.C. 160(c) from the Universal Service High Cost Loop Support Mechanism (WC Docket No. 05-337), on grounds, among other things, that FCC should first resolve issues remanded by 10th Circuit.
December 11, 2007	Vermont files an <i>ex parte</i> letter reporting telephone conference with Ian Dillner, Legal Advisor to Chairman Kevin Martin, in which Vermont expresses concern that the FCC move forward expeditiously with its remand, as the Court directed.
February 19, 2008	Vermont, Maine, Nebraska, South Dakota State Commissions and related agencies and West Virginia Consumer Advocate Division, files Opposition to Petition of Hawaiian Telcom, Inc. for Waiver of Sections 54.309 and 54.313 (d)(vi) of the Commission's rules (WC Docket 08-4), on grounds, among other things, that Commission must first resolve fundamental definitional and conceptual issues in the 10 <sup>th</sup> Circuit remand case.